UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DOUGLAS AUTOTECH CORPORATION

Respondent,

and

CASE NO. 7-CA-51428

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICAN (UAW), AFL-CIO, AND ITS LOCAL 822

Charging Party.
_____/

RESPONDENT DOUGLAS AUTOTECH'S MOTION FOR RECONSIDERATION, REHEARING, AND TO REOPEN THE RECORD AND BRIEF IN SUPPORT

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INTRODUCTION

Even the National Labor Relations Board ("NLRB") Majority (the NLRB Majority consists of Chairman Pearce and Member Becker, hereafter "NLRB Majority") acknowledges that: **"This case involves unusual and unsettled legal issues."** (NLRB Majority Decision at 12). Douglas Autotech Corporation ("DAC") agrees wholeheartedly. DAC believes the NLRB Majority incorrectly decided the "unusual and unsettled legal issues" and committed several material errors in the process.

DAC, pursuant to Section 102.48(d) of the NLRB's Rules and Regulations, requests that the NLRB reconsider its November 18, 2011 Decision and Order ("NLRB Majority's Decision"), reported at 357 NLRB No. 111 (2011) and remand the case to the Administrative Law Judge ("ALJ") to reopen the record to consider additional evidence made relevant because of the NLRB Majority's Decision.

NLRB Rule and Regulation Section 102.48(d) permits any party to move for reconsideration, rehearing, or to reopen the record after an NLRB decision based on extraordinary circumstances or **material error**. DAC respectfully submits that the NLRB Majority's Decision suffers from several material errors including:

- The NLRB Majority erred in determining that a lockout constitutes an affirmative act of reemployment;
- The NLRB Majority erred when it stated that a lockout constitutes reemployment, but a lockout and a reservation of rights does not constitute reemployment;
- The NLRB Majority erred because its Remedial Order and Notice to Employees is inconsistent with its Decision by requiring full reinstatement and make whole relief despite DAC's lawful lockout;
- The NLRB Majority further erred when it stated "[t]he parties negotiations since August 4 have thus been limited to the effects of the unlawful discharges."

- The NLRB Majority erred by requiring DAC to bear the burden of proof in the compliance phase of the case that its lawful lockout would have continued;

- The NLRB Majority erred by requiring DAC to bear the burden of proof that its lawful lockout would have continued;

- The NLRB Majority erroneously applied its decision in *Kentucky River* retroactively to this case; and

- The NLRB Majority erroneously ordered DAC to post the required notice electronically.

I. THE NLRB MAJORITY ERRED IN DETERMINING THAT A LOCKOUT CONSTITUTES AN AFFIRMATIVE ACT OF REEMPLOYMENT

In its Decision, the NLRB Majority recognized that the Union and its members engaged in an illegal strike which violated the notice requirements specified in Section 8(d)(3) of the National Labor Relations Act "(Act"). The NLRB Majority further admitted that the employees who participated in the strike lost the protections of the Act. Section 8(d)(3) of the Act explicitly states that:

> Any employee who engages in a strike within any notice period specified in this subsection . . . shall lose his status as an employee of the employer engaged in the particular labor dispute . . . but such loss of status for such employee shall terminate if and when he is reemployed by the employer.

29 U.S.C. § 158(d)(4). The NLRB Majority erred when it concluded that DAC reemployed the striking workers when it instituted a lawful lockout. The NLRB Majority's "lockout" equals "reemployment" conclusion is contrary to the Act's explicit language and the NLRB's own legal precedent.

In the November 18, 2011 Decision, the NLRB Majority concluded that "[b]y declaring the employees locked out, the Respondent was necessarily, **as a matter of Board law**, declaring them to be its employees, i.e., it was reemploying them." Emphasis added. (NLRB Decision at 8). The NLRB Majority, however, can cite no NLRB case law to support its

conclusion. In fact, even a cursory review of NLRB law reveals that the NLRB itself commonly uses the term "reemployment" to describe an action which occurs at the conclusion of a lockout, not when the lockout begins.

For example, as the Dissent notes in the NLRB's Decision, the NLRB in *Tidewater Construction Co.,* 333 NLRB 1264 (2001) itself noted that "[a]cceptance of the Respondent's bargaining proposals by the Union . . . stood as the lone obstacle to their *reemployment*." (emphasis added). *See also Oshkosh Ready-Mix Co.*, 179 NLRB 350, 358 (1969) (During a lockout "*reemployment* can be obtained only by concession to the employer's terms") (emphasis added); *Great Falls Employers Council, Inc.*, 123 NLRB 974, 982-83 (1959) (holding that respondents were under a duty to bargain with the Union about partial *reemployment* during a lockout); *Triplett Elec. Inst. Co.*, 5 NLRB 835, 849-50 (1938) (describing locked out worker as being "*reemployed"* when he returned to work).

This repeated usage of the term "reemployment" in the context of workers returning to work at the conclusion of a lockout is incompatible with the NLRB Majority's conclusion in the November 18, 2011 Decision. In its November 18, 2011 Decision, the NLRB Majority concluded that DAC "reemployed" the illegal strikers when it locked them out. Under the NLRB *Tidewater, Oshkosh,* and *Great Falls* precedent, however, DAC would also "reemploy" the illegal strikers had the lockout ended and the strikers returned to active employment. How could DAC reemploy the illegal strikers twice - at both the beginning and the end of the lockout? This is nonsensical.

Although the cases cited above do not involve any analysis under the Act, Section 8(d)(4), the meaning of "reemployed" used in *Tidewater, Oshkosh,* and *Great Falls* as referring to "active employment" is further supported by the NLRB's decisions in *Boghosian Raisin*, 342

NLRB 383 (2004) and *Fairprene Indus. Prod.*, 292 NLRB 797 (1989) – cases that did involve questions of whether or when illegal strikers became "reemployed" for purposes of Section 8(d)(4).

In *Boghosian Raisin*, the NLRB held that the company did not "reemploy" workers who had engaged in an illegal strike and then had been subsequently locked out. The strikers in the *Boghosian* case lost their protected status as employees under the Act when their union failed to file a notice with the FMCS prior to the start of the strike. Although the union made an unconditional offer to return work, the company locked the illegal strikers out by refusing to accept their offer (whether the company said the words "lockout" is irrelevant because in fact that is what the company did), and then terminated them for engaging in the illegal strike a week later. The NLRB held that the company had never "reemployed" the strikers.

The NLRB's decision in *Boghosian Raisin* and in this case cannot be reconciled. If the NLRB Majority's holding in this case is accepted, the employer in *Boghosian Raisin* "reemployed" the illegal strikers when it locked them out after discovering the strike was illegal. The NLRB, however, came to exactly the opposite conclusion. The illegal strikers in *Boghosian Raisin* never regained the protection of the Act, because they had never been "reemployed."[1]

In *Fairprene*, on the other hand, the NLRB found that the employer had "reemployed" illegal strikers after the company and the union had reached a full strike settlement and the company scheduled the strikers to return to work. After agreeing to settle the strike and

[1] As noted in DAC's initial brief to the NLRB, Counsel for the General Counsel in *Boghosian Raisin* specifically argued that the company had "reemployed" the illegal strikers when it locked them out. (DAC's Brief in Support of Exceptions, pp. 12-13). The NLRB Majority rejected DAC's exception stating: "Finally, the General Counsel in *Boghosian Raisin* did not allege that the employer "reemployed" the strikers by imposing a lockout. Consequently, the Board did not consider that theory." (NLRB Majority Decision at 6). The NLRB Majority is incorrect in this statement and conclusion, and thus has committed a material error.

after scheduling the strikers to return, the employer terminated the illegal strikers. The NLRB concluded that the illegal strikers had regained the protection of the Act "when the full strike settlement was reached and the company scheduled the employees return to work." *Fairprene*, 292 NLRB at 803.

Applying this precedent to the case at hand, DAC's actions were clearly more akin to the *Boghosian Raisin* facts than the *Fairprene* facts. Like in *Boghosian Raisin*, the illegal strikers made an unconditional offer to return to work. DAC responded to the Union's unconditional offer by lawfully locking out the illegal strikers. Unlike in *Fairprene*, DAC and the Union never reached a new collective bargaining agreement, never reached an agreement to end the strike, and never scheduled the illegal strikers to return to work. The NLRB Majority's conclusion, therefore, that DAC reemployed the illegal strikers merely by locking them out is directly contrary to established NLRB law, and constitutes material error.

II. THE NLRB MAJORITY ERRED WHEN IT STATED THAT A LOCKOUT CONSTITUTES REEMPLOYMENT, BUT A LOCKOUT AND A RESERVATION OF RIGHTS DOES NOT CONSTITUTE REEMPLOYMENT

The NLRB Majority states when discussing *Boghosian Raisin* and at various other places in the Decision, that although a lockout constitutes "reemployment" under the Act, a lockout and a simultaneous reservation of rights to later discharge illegal strikers does not constitute "reemployment." (NLRB Majority Decision at 5, ftn 12; 6; 8, ftn 23). The NLRB Majority's statement is illogical. Either a lockout is reemployment or it is not. Locking illegal strikers out while simultaneously reserving the right to terminate them later does not mean the lockout did not occur. If the NLRB Majority is correct that lockout constitutes reemployment, then even suggesting that lockout with a reservation of rights might not be reemployment confirms that the NLRB Majority's Decision itself is a material error because it is illogical.

III. THE NLRB MAJORITY ERRED BECAUSE ITS REMEDIAL ORDER AND NOTICE TO EMPLOYEES IS INCONSISTENT WITH ITS DECISION BY REQUIRING FULL REINSTATEMENT AND MAKE WHOLE RELIEF DESPITE DAC'S LAWFUL LOCKOUT

In his recommended Order, the ALJ in this case required that DAC engage in several affirmative actions to effectuate the purposes of the Act: These affirmative actions included:

> [2](c) With 14 days from the date of the Board's Order, offer the unlawfully discharged bargaining unit employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.
>
> (d) Make all of the unlawfully discharged bargaining unit employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(NLRB Majority Decision at 42). This is the NLRB's traditional remedy in unlawful discharge cases requiring reinstatement and backpay.

The NLRB Majority's November 18, 2011 Decision modified the ALJ's recommended Order in several significant ways. For some unexplainable reason, the NLRB Majority left the ALJ's recommended Order paragraph 2(c) unmodified and did not modify the proposed Notice to Employees. The NLRB Majority stated: "We shall modify the judge's recommended Order … to conform to the findings herein. We shall also substitute a new notice to conform to the recommended Order as modified." (NLRB Majority Decision at 1, ftn 4). The NLRB Majority also stated that the ALJ's recommended Order be modified in paragraph 2(d) to state:

> "Make all of the unlawfully discharged bargaining unit employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision **as amended in this decision."** (Emphasis added.)

(NLRB Majority Decision at 12). The NLRB Majority did not require that the ALJ recommended Order, paragraph 2(c), be amended to add the words "as amended in this decision" consistent with how the NLRB Majority modified the ALJ's recommended Order paragraph 2(d). DAC's position is that the NLRB Majority mistakenly/inadvertently failed to modify the ALJ's recommended Order paragraph 2(c) and failed to modify the proposed Notice to Employees to conform to its Decision. This is a material error.

The proposed Notice to Employees states in relevant part that:

> "WE WILL, within 14 days from the date of the Board's Order, offer the bargaining unit members unlawfully discharged on August 4, 2008, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.
> WE WILL make all of the bargaining unit employees whole for any loss of earnings and other benefits resulting from their unlawful discharge on August 4, 2008, less any interim earnings, plus interest."

This proposed Notice to Employees does not accurately reflect the NLRB Majority's November 18, 2011 Decision. In its Decision, the NLRB Majority recognized that, following the Union's illegal strike, DAC had lawfully locked out the bargaining unit. (NLRB Majority Decision at 10). The NLRB Majority further recognized that DAC and the Union remained "far apart on a number of key issues . . . and it is uncertain whether, or when, the parties would have reached agreement on the terms of a new contract or bargained to a good-faith impasse ending the lockout." *Id.* The NLRB Majority also observed that DAC had continued to operate successfully using temporary replacement workers, and that the Union may have been forced to change its bargaining position based on DAC's successful continued operation. (NLRB Majority Decision at 11).

These facts all are relevant to the appropriate remedy in this case. The remedial purpose of the Act is to restore the "status quo." That is to "restore the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." (NLRB Majority Decision at 10). (Internal quotation omitted). The unit employees are not entitled to receive back pay from the date of their termination, because a return to the status quo is a return to a legal lockout. In fact, given the divergent bargaining positions of the parties, the lockout continuing until the present day is more likely than not. If a lockout continued to date, the unit employees are not entitled to any back pay and do not return to work at DAC unless they accept the lockout terms and conditions.

Based on these unique factual circumstances, even the NLRB Majority was "persuaded that an unqualified reinstatement and backpay order is not sufficiently 'adapted to the [specific] situation which calls for redress' . . . ." (NLRB Majority Decision at 10). Accordingly, the NLRB Majority fashioned a specific remedy to fit the unique circumstances of this case. The amount of back pay, if any, and the reinstatement of the unit employees, if appropriate, must be determined based on an analysis of whether the lockout of the strikers in place when DAC terminated them would have continued. (NLRB Majority Decision at 11). DAC considers this to be a "hybrid" remedy.

The NLRB Majority's modification to the traditional remedy in unlawful discharge cases requiring reinstatement and back pay which the ALJ proposed (as cited above) has not been incorporated into the proposed Notice to Employees and thus does not sufficiently incorporate the NLRB Majority's discussion of the "hybrid" remedy the NLRB Majority has stated. Again, DAC presumes that this is an NLRB Majority oversight/inadvertent error. The current proposed Notice to Employees is inappropriate until it has been determined whether the

lockout would have/has continued to date. The appropriate Notice to Employees, if required at all, should state:

> "WE WILL, within 14 days from the date of the Board's Order, offer the bargaining unit members unlawfully discharged on August 4, 2008, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed **unless it is proven that the lawful lockout in effect on August 3, 2008 would have continued to date.**
>
> WE WILL make all of the bargaining unit employees whole for any loss of earnings and other benefits resulting from their unlawful discharge on August 4, 2008, less any interim earnings, plus interest **unless it is proven that the lawful lockout in effect on August 3, 2008 would have continued to date.**"

Likewise, the make-whole provision in paragraph 2(d) of the recommended Order should be modified as described in the NLRB Majority's Decision to add the words "as amended in this decision." These portions of the NLRB Majority's Decision suffer from material error which must be corrected.

IV. THE NLRB MAJORITY FURTHER ERRED WHEN IT STATED "[T]HE PARTIES' NEGOTIATIONS SINCE AUGUST 4 HAVE THUS BEEN LIMITED TO THE EFFECTS OF THE UNLAWFUL DISCHARGES"

In fashioning/discussing its "hybrid" remedy in this case, the NLRB Majority stated that:

> "The parties' negotiations since August 4 have thus been limited to the effects of the unlawful discharges. In these circumstances, we cannot determine whether, or when, the lockout would have ended and the unit employees would have returned to work in the absence of the Respondent's unlawful conduct."

(NLRB Majority Decision at 11). The NLRB Majority is simply wrong. Since August 4, 2008, DAC and the Union have continued negotiations and have negotiated more than effects. DAC and the Union have negotiated regarding wages, hours and all other terms and conditions of employment. DAC has confirmed the lockout in each instance. In order to accurately state the record, DAC requests that the NLRB Majority reopen the record to allow the ALJ to take

evidence regarding the bargaining that has occurred between the Union and DAC. The NLRB Majority's Decision in this regard is in material error.

V. THE NLRB MAJORITY ERRED BY REQUIRING DAC TO BEAR THE BURDEN OF PROOF IN THE COMPLIANCE PHASE OF THE CASE THAT ITS LAWFUL LOCKOUT WOULD HAVE CONTINUED

In the present case, the status quo ante immediately prior to DAC terminating the illegal strikers was a lawful lockout. (NLRB Majority Decision at 10). As discussed above, the NLRB Majority correctly noted that, given the existence of the lockout and status of the negotiations, an unqualified reinstatement and backpay order would not be appropriate in this case. (NLRB Majority Decision at 10). Any remedy "must be sufficiently tailored to expunge only the *actual*, and not merely *speculative* consequences of the unfair labor practices." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900, 902-904 (1984) (emphasis in original).

The NLRB Majority properly found that it could not determine (1) whether, or when, the lockout would have ended or (2) if the lockout ended, under what terms and conditions the illegal strikers would have returned to work. (NLRB Majority Decision at 10-11). In order to resolve these highly significant questions, a substantial amount of additional testimony and evidence must be introduced. DAC anticipates that such testimony and evidence will include information relating to bargaining sessions between DAC and the Union, as well as DAC's attempts to schedule additional bargaining sessions and obtain information to assist in bargaining. The evidence that DAC anticipates introducing includes, but is not limited to:

- **May 7, 2010** correspondence from DAC to the Union, including a Conditional Reinstatement Offer and offer to bargain;
- **February 11, 2011** correspondence from DAC to the Union outlining the terms and conditions to accept to end the lockout and offering to bargain,

consistent with USDC Judge Jonker's 10(j) opinion that the Local 822 UAW members were lawfully locked out;

- **February 25, 2011** through **March 14, 2011** correspondence between DAC and the Union regarding bargaining;
- **March 15, 2011** bargaining session testimony and documents regarding bargaining session between DAC and the Union confirming lockout status and the terms and conditions to accept to end the lockout;
- **March 16, 2011** correspondence regarding the March 15, 2011 bargaining session and information request from DAC to the Union;
- **April 1, 2011** correspondence from the Union to DAC regarding bargaining;
- **April 4, 2011** correspondence from DAC to the Union regarding bargaining and DAC's information request;
- **April 6, 2011** correspondence from the Union to DAC regarding DAC's information request;
- **April 8, 2011** correspondence from DAC to the Union regarding DAC's information request and a further request to participate in bargaining;
- **April 12, 2011** bargaining session testimony and documents regarding the bargaining session between DAC and the Union confirming lockout status and the terms and conditions to accept to end the lockout;
- **April 13, 2011** correspondence from DAC to the Union summarizing bargaining session between DAC and the Union, inviting the Union to continue bargaining and proposing bargaining dates; and

- **April 20, 2011** correspondence from the Union to DAC regarding DAC's proposal.

This additional evidence confirming the lockout continuation, bargaining sessions, and the status of ongoing negotiations were all developed subsequent to the ALJ hearing and the Decision in this matter. Thus, the evidence was obviously unavailable for presentation during the trial. Moreover, since the NLRB Majority's hybrid remedy in this matter is a remedy of first impression, there is no way DAC could have anticipated the proofs the NLRB Majority now indicate are required regarding the remedy. DAC submits that if the record is reopened and such evidence introduced, it will result in a finding that the lockout has persisted since August 2008. Such finding would result in the illegal strikers being returned to lockout status without any back pay. Given that this is a unique and complex issue, such testimony and evidence is more appropriate for the ALJ's review, rather than presentation at the Compliance stage. Similarly, reopening the record and taking this evidence will help resolve the material error issues regarding the recommended Order and the proposed Notice to Employees raised in this motion.

VI. THE NLRB MAJORITY ERRED BY REQUIRING DAC TO BEAR THE BURDEN OF PROOF THAT ITS LAWFUL LOCKOUT WOULD HAVE CONTINUED

The NLRB Majority states that DAC should bear the burden to produce evidence that the lockout would have continued. (NLRB Majority Decision at 10 – 11). DAC should not bear the burden to prove the lockout would have continued. Since the lawful status quo prior to the alleged illegal act was lockout, the Union should bear the burden to prove the lockout would not have continued.

VII. THE NLRB MAJORITY ERRONEOUSLY APPLIED ITS DECISION IN *KENTUCKY RIVER* RETROACTIVELY TO THIS CASE

The NLRB Majority Decision modified the ALJ's recommended Order to require that back pay and other monetary awards shall be paid with interest compounded on a daily basis in accordance with the NLRB's decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). The retroactive application of *Kentucky River Medical Center* would constitute a "manifest injustice."

The NLRB will not apply a decision retroactively if such application would work a "manifest injustice" against pending cases. *SNE Enterprises, Inc.*, 344 NLRB 673, 673 (2005). In determining whether retroactivity would be unjust, the NLRB considers "the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application." *Id.* Applying *Kentucky River* to this case would be manifestly unjust under the *SNE Enterprises* test.

VIII. THE NLRB MAJORITY ERRONEOUSLY ORDERED DAC TO POST THE REQUIRED NOTICE ELECTRONICALLY

The NLRB Majority Decision modified the ALJ's recommended Order to provide for the posting of notice electronically in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). As noted by Member Hayes in his dissent to *J. Picini Flooring*, and for the reasons contained in that dissent, requiring electronic posting "transform[s] what has heretofore been an extraordinary remedy into a routine remedy." *J. Picini Flooring*, at *8. Electronic posting is an extraordinary remedy that should be compelled only in cases involving egregious unfair labor practices or recidivist violators of the Act. The NLRB Majority Decision did not expressly hold, nor is there convincing evidence, that this case involves the kind of egregious activity warranting the "extraordinary" remedy of electronic notice posting. Indeed, the NLRB Majority concluded

that DAC did not engage in egregious unfair labor practices. The NLRB Majority therefore erroneously amended the ALJ's Order to require electronic notice posting.

IX. CONCLUSION

For all of the above reasons, DAC, pursuant to Section 102.48(d) of the NLRB Rules and Regulations, requests that the NLRB reconsider its Decision dated November 18, 2011, reported at 357 NLRB No. 111 (2011) and remand the case to the ALJ to reopen the record to consider additional evidence made relevant by the NLRB Majority's Decision.

Dated: December 15, 2011

/s/ Jeffrey J. Fraser

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CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2011, I electronically filed the foregoing document with the National Labor Relations Board using its e-filing system, and served a copy of the forgoing document by electronic service and next day delivery to the following:

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I also sent eight (8) copies of the foregoing document via next day delivery to the Executive Secretary to the Board pursuant to the service requirements of Sections 102.114(i) and 102.24 of the Board's Rules and Regulations.

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